

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	No. CR-F-02-5379 OWW
)	
	)	MEMORANDUM DECISION AND
Plaintiff/	)	ORDER DENYING PETITIONER'S
Respondent,	)	MOTION TO VACATE JUDGMENT,
	)	DENYING CERTIFICATE OF
vs.	)	APPEALABILITY AND DIRECTING
	)	CLERK OF COURT TO PROCESS
	)	PETITIONER'S NOTICE OF
MANUEL QUINTERO,	)	APPEAL FROM THE MEMORANDUM
	)	DECISION AND ORDER FILED ON
	)	SEPTEMBER 2, 2010
)	
Defendant/)	
Petitioner.)	
)	
)	

By Memorandum Decision and Order filed on September 2, 2010,
Petitioner's "Motion for Reduction of Sentence (Crack Cocaine)
Pursuant to 18 U.S.C. § 3582(c) (2)" was denied:

[A]lthough Amendment 706 is applicable to
Petitioner, according to the relevant
U.S.S.G. policy statement, the amendment does
not have the effect of lowering Petitioner's
applicable guideline range because of the
operation of the statutory mandatory minimum.

On November 9, 2010, pursuant to the "mailbox rule,"
Petitioner filed a motion to vacate this ruling pursuant to "Rule

1 36, in pari materia to Rule 60(b), Fed. R. Civ. Proc."

2 Petitioner's motion is coupled with a request for certificate of
3 appealability and a notice of appeal.

4 Petitioner's motion to vacate is DENIED. Rule 36, Federal
5 Rules of Criminal Procedure, provides:

6 After giving any notice it considers
7 appropriate, the court may at any time
8 correct a clerical error in a judgment,
9 order, or other part of the record, or
oversight or omission.

10 Rule 36, as with Rule 60(a), Federal Rules of Civil Procedure, is
11 a vehicle for correcting clerical mistakes, but it may not be
12 used to correct judicial errors in sentencing. *U.S. v. Penna*,
13 319 F.3d 509, 513 (9th Cir.2003); *Wright, King & Klien*, 3 Federal
14 Practice and Procedure, § 611. Because Petitioner seeks
15 reconsideration of a motion seeking reduction of a criminal
16 sentence, Rule 60(b), Federal Rules of Civil Procedure, has no
17 application to Petitioner. See *United States v. Gardner*, 2007 WL
18 3335020 at *3 (E.D.Cal., Nov. 8, 2007). Petitioner's remedy from
19 the denial of his motion for reduction of sentence is appeal of
20 the ruling to the Ninth Circuit Court of Appeals.¹

21
22 ¹Even if Petitioner were entitled to bring this motion for
23 reconsideration, Petitioner's motion is without merit. *United*
24 *States v. Booker* does not apply retroactively to convictions that
25 became final before its pronouncement, *United States v. Cruz*, 423
26 F.3d 1119 (9th Cir.2005), cert. denied, 546 U.S. 1155 (2006), and
the District Court has no discretion to depart below a statutory
mandatory minimum sentence. See *United States v. Wipf*, 620 F.3d
1168 (9th Cir.2010); 18 U.S.C. § 3553(f). No opinion is expressed
as to the timeliness of any appeal filed by Petitioner.

Accordingly:

1. Petitioner's motion to vacate is DENIED;

2. Petitioner's application for a certificate of appealability is DENIED because jurists of reason would not find it debatable that Petitioner is not entitled to a reduction in his sentence;

3. The Clerk of the Court is directed to process
Petitioner's notice of appeal from the Memorandum Decision and
Order filed on September 2, 2010.

IT IS SO ORDERED.

Dated: November 22, 2010

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE